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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

IDAHO GROUND WATER APPROPRIATORS, INC., Petitioner, v. THE IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN in his capacity as the Director of the Idaho Department of Water Resources, Respondents.	**Case No. CV27-22-00945** **RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS**
IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	
IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN	

ARGUMENT

The Court should dismiss IGWA's petition for judicial review for lack of subject matter jurisdiction. As argued in the Department's motion to dismiss, IGWA did not exhaust its administrative remedies under Idaho Code § 42-1701A(3). The doctrine of exhaustion further supports dismissal. The administrative process is not complete, IGWA has not exhausted its administrative remedies, and its petition thus lies outside the Court's jurisdiction.

Nevertheless, IGWA's Response to Respondents' Motion to Dismiss ("Response") attempts to chart a way out of the administrative hearing IGWA requested and was granted. But IGWA's arguments are not supported by the Idaho Administrative Procedure Act ("APA"), basic statutory construction principles, or this Court's previous decisions in indistinguishable cases. Moreover, IGWA's rush to this Court also contradicts its own hearing request. The hearing is being scheduled and will afford IGWA the opportunity to persuade the Director to change course. The Court should allow that to happen because it is not only required by law but will also conserve judicial resources.

A. The APA does not override Idaho Code § 42-1701A's specific procedures for hearings before the Director.

IGWA's APA arguments ignore a "basic tenet of statutory construction": "a more general statute should not be interpreted to encompass an area already covered by a special statute." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 743, 947 P.2d 409, 416 (1997). This principle has outsized importance in administrative law. As a gap-filling statute, "the APA controls agency decisionmaking procedures only in the absence of more specific statutory requirements." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277

(1994). In other words, the Legislature can render the APA's general rules inapplicable by enacting more specific statutes for certain administrative proceedings. The Idaho Supreme Court has recognized this principle repeatedly. *E.g.*, *Guillard v. Dep't of Emp.*, 100 Idaho 647, 650, 603 P.2d 981, 984 (1979) (explaining, when a statute "specifically delineates departmental procedure," it "controls over a more general statute when there is any conflict"); *City of Ririe v. Gilgen*, 170 Idaho 619, 515 P.3d 255, 262 (2022) (noting "the Idaho Legislature has provided certain exceptions to the ordinary framework of the APA").

Here, § 42-1701A is the more specific statute because, this Court has held, it "governs hearings before the Director." Order on Mot. to Determine Jurisdiction at 3, *Sun Valley Co. v. Spackman*, No. CV01-16-23185 (Ada Cnty. Dist. Ct. Idaho Feb. 16, 2017).[1] In particular, "[s]ubsection (3) governs the situation" here because "the Director t[ook] an action without a hearing." *Id*. IGWA invoked subsection (3)'s "mandatory" procedure when "it file[d] a written petition with the Director stating the grounds for contesting his action and request[ing] a hearing." *Id*. at 4. The Director granted IGWA's hearing request and is in the process of scheduling a hearing with input from the parties. So, "[u]ntil the Director issues his written decision following hearing," IGWA "is not entitled to judicial review under the plain language of Idaho Code § . . . 42-1701A(3)." *Id*.

Crucially, IGWA does not identify a statute providing a "right to a hearing before the director" on the issue of compliance with an approved mitigation plan. I.C. § 42-1701A(3). Nor could it, for no such statute exists. Instead, IGWA points to general provisions in the APA, which, as detailed below, do not override § 42-1701A. Because

[1] Available at: http://www.srba.idaho.gov/Images/2017-02/0080053xx00046.pdf.

there is no statutory right to a hearing in this context, the Director was not required to hold one before issuing the Compliance Order. However, § 42-1701A(3) entitles IGWA to a hearing "to contest" the Compliance Order, and that process must be completed before judicial review.

IGWA's reliance on Idaho Code § 67-5240 is misplaced. Section 67-5240 does not mandate a pre-decision hearing. And it only applies if a more specific procedure is absent. Indeed, § 67-5240 announces that the APA governs contested cases, "*except as provided by other provisions of law*"—including § 42-1701A. (emphasis added). The APA's plain language, which IGWA conspicuously avoids quoting, refutes IGWA's argument.

Idaho Code § 67-5242 is no help to IGWA either. Nothing in § 67-5242 requires the Director to hold a hearing before determining compliance with an approved mitigation plan. In fact, nothing in § 67-5242 speaks to when any administrative hearing must occur. True to its title, that statute provides default procedures *at* hearings, whenever they may occur. Simply put, the APA does not excuse IGWA's failure to exhaust its remedies under § 42-1701A.

B. *Sun Valley* and *McCain* are indistinguishable.

IGWA cannot escape *Sun Valley* and *McCain*. Nevertheless, IGWA asserts the outcome should be different here because *Sun Valley* and *McCain* "involved urgent water administration matters" and "no contested case had previously been functioning under the APA." *Response* at 9. These conclusory assertions are wrong on the facts and the law.

First, *Sun Valley* and *McCain* arose from an order designating a ground water management area. While urgent to some extent, such designations are just the beginning of a series of regulatory steps. *See* I.C. § 42-233b (authorizing post-designation ground water

management plans and limitations on ground water appropriations or withdrawals). By contrast, this administrative proceeding arose from a delivery call that has been ongoing for more than a decade. The issue is whether IGWA's members complied with their approved mitigation plan, an intricate arrangement that provides safe harbor from curtailment only if it is "effectively operating." IDAPA 37.03.11.042.02. And there is evidence the mitigation plan was not effectively operating during the 2021 irrigation season. But the issue was not before the Director until the summer of 2022, after the Surface Water Coalition ("SWC") and IGWA hit an impasse. Few water administration matters are more urgent—a point that IGWA's pending motion to expedite briefing effectively concedes.

Second, *Sun Valley* and *McCain* arose from a contested case. By definition, a "contested case" is "a proceeding which results in the issuance of an order." I.C. § 67-5201(7). As noted above, *Sun Valley* and *McCain* both involved challenges to an order. And both the Sun Valley Company and McCain Foods USA, Inc. filed their petitions for review under Idaho Code § 67-5270(3), which only applies to a final order issued in a contested case. Pet. for Jud. Rev. at 7, *Sun Valley Co. v. Spackman*, No. CV01-16-23185 (Ada Cnty. Dist. Ct. Idaho Dec. 23, 2016);[2] Notice of Appeal & Pet. for Jud. Rev. at 1, *McCain Foods USA, Inc. v. Spackman*, No. CV01-16-21480 (Ada Cnty. Dist. Ct. Idaho Nov. 17, 2016).[3] The notion that *Sun Valley* and *McCain* involved something other than a contested case is simply incorrect.

[2] Available at: http://www.srba.idaho.gov/Images/2017-01/0080053xx00001.pdf.
[3] Available at: http://www.srba.idaho.gov/Images/2016-12/0080051xx00001.pdf.

In *Sun Valley*, in *McCain*, and here, a party prematurely sought judicial review to challenge an order issued without a hearing. The Court dismissed the petitions in *Sun Valley* and *McCain* because the petitioners had not exhausted their administrative remedies under § 42-1701A(3). After identifying the grounds for dismissal in *Sun Valley*, the Court dismissed the *McCain* petition on its own initiative. Order *Sua Sponte* Dismiss. Pet. for Jud. Rev., *McCain Foods USA, Inc. v. Spackman*, No. CV01-16-21480 (Ada Cnty. Dist. Ct. Idaho Apr. 10, 2017).[4] IGWA offers no reason for a different result.

C. Determining compliance with an approved mitigation plan in a delivery call is within the Director's authority.

IGWA argues it can be excused from exhausting its administrative remedies because the Director exceeded his authority. But IGWA's premise is flat wrong.

Under the Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), IGWA's mitigation plan is not some "third party contract[]" outside the Director's authority. *Response* at 7. Far from a mere "contract dispute[]," *id.*, the underlying administrative proceeding addresses compliance with a mitigation plan the Director conditionally approved under the CM Rules. *See* IDAPA 37.03.11.043. That approved plan remains subject to the Director's ongoing oversight to ensure it is "effectively operating." IDAPA 37.03.11.042.02. The CM Rules derive from the rulemaking authority in Idaho Code §§ 42-603 and 42-1805(8). IDAPA 37.03.11.000. As such, the CM Rules are "necessary to carry out the laws"—including multiple provisions of the Ground Water Act (Idaho Code §§ 42-226 to 42-239, as amended)—"in accordance

[4] Available at: http://www.srba.idaho.gov/Images/2017-04/0080051xx00013.pdf.

with the priorities of the rights of the users thereof." I.C. § 42-603. The Director has ample legal authority here, so there is no basis for an exception to the exhaustion requirement.

Indeed, this Court has not questioned the Director's authority to oversee IGWA's mitigation plans or to act when one of those plans proves deficient. *E.g.*, Mem. Decision & Order, *Rangen, Inc. v. IDWR*, No. CV-2014-4970 (Twin Falls Cnty. Dist. Ct. Idaho June 1, 2015) ("*Rangen Order*").[5] To the contrary, this Court held:

> Junior users know, or should know, that they are only permitted to continue their offending out-of-priority water use so long as they are meeting their mitigation obligations under a mitigation plan approved by the Director. IDAPA 37.03.11.040.01.a,b. If they cannot, then the Director *must* address the resulting material injury by turning to the approved contingencies. If there is no alternative source of mitigation water designated as a contingency, then the Director *must* turn to the contingency of curtailment.

Id. at 8 (emphasis added). The Court's holding is crystal clear.

D. The Remedy Agreement shows that IGWA was not deprived of property and thus did not suffer a due process violation.

The SWC and IGWA entered into the Remedy Agreement for the express purpose of avoiding curtailment. "The parties desire to reach a settlement such that the Director does not curtail certain IGWA members during the 2022 irrigation season." *Remedy Agreement* ¶ E. Further, the parties agreed that the Director "shall issue a final order regarding the interpretive issues raised by the SWC Notice." *Id*. § 3. IGWA also agreed it would "not seek review of the remedy agreed to herein and incorporated into the Director's Order." *Id*. Consistent with the Remedy Agreement, the Director issued the Compliance Order and approved the negotiated remedy because the parties agreed it "shall satisfy IGWA's obligation under the [mitigation plan] for 2021 only." *Id*. § 1. The Compliance

[5] Available at: http://www.srba.idaho.gov/Images/2015-06/0080034xx00095.tif.

Order only assessed compliance for the 2021 irrigation season and did not curtail any ground water rights.

IGWA, however, claims the "Compliance Order restricts the amount of water IGWA's members can divert under their water rights." *Response* at 2. This is nonsensical. The only restrictions the Compliance Order mentions are the restrictions IGWA voluntarily agreed to in either its mitigation plan or the Remedy Agreement. "This is the price of allowing junior users to continue their offending out-of-priority water use." *Rangen Order* at 8. Because there are no contingencies in the mitigation plan itself, the only alternative to its restrictions would be curtailment. *Id*.

Yet IGWA avoided curtailment through the Remedy Agreement, so the Compliance Order did not deprive IGWA's members of any property. To the extent IGWA suggests its mitigation plan somehow creates a property right in out-of-priority pumping, it overlooks settled law: "A water user has no property interest in being free from the State's regulation of water distribution in accordance with the prior appropriation doctrine . . . ." *Thompson Creek Mining Co. v. IDWR*, 148 Idaho 200, 213–14, 220 P.3d 318, 331–32 (2009). And, in any event, the Compliance Order will be eligible for reconsideration (if warranted) in the administrative hearing process IGWA requested. *See* I.C. § 42-1701A(3). Expeditiously resolving *that* process is the appropriate, and legally mandated, way to address any lingering due process concerns.

E. IGWA's request for an administrative hearing should be honored, not obviated by premature judicial review.

IGWA states its "objective in petitioning for judicial review is to have the Compliance Order set aside and to have the Director instructed to comply with due process

and the APA by holding a hearing . . . .” *Response* at 5. There is an obvious contradiction in IGWA’s position. On one hand, it complains of a due process violation because it was not afforded a pre-decision hearing. *Id*. On the other hand, it believes “an evidentiary hearing before the Department may prove unnecessary,” *id*., and suggests its hearing request is a perfunctory “safeguard.” *Id* at 9. IGWA cannot have it both ways.

The way to escape IGWA’s procedural hall of mirrors is to dismiss this case and allow the administrative proceedings to run their course. The Department stands ready to do just that. In fact, the Director is currently seeking the parties’ input on hearing dates before the 2023 irrigation season. The administrative record may develop further, and judicial resources will be conserved in the meantime. The Court can and should simply allow the administrative process to play out the way the Legislature intended.

CONCLUSION

The Department respectfully requests that the Court grant the Department’s motion to dismiss IGWA’s petition for judicial review.

DATED this 17th day of November 2022.

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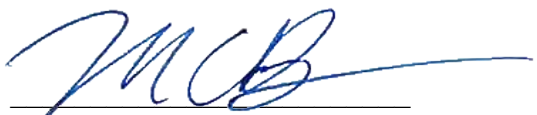

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November 2022, I caused to be served a true and correct copy of the foregoing Respondents' Reply in Support of Motion to Dismiss via iCourt E-File and Serve, upon the following:

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